Supreme Court, U.S.
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No. : 08-1464

In the

Supreme Court of the United States

EAST END PROPERTY COMPANY #1 LLC, MARK KASPIEV, JOHN McCONNELL, JOHAN McCONNELL, DONALD SEUBERT, PATRICIA SEUBERT, FRANCESCA HURLEY, MICHAEL HURLEY, LAURENCE EINUIS, EMILY KARLOVITS, STEPHEN HENRY, THE YAPHANK TAXPAYERS AND CIVIC ASSOCIATION, INC. and the SOUTH YAPHANK CIVIC ASSOCIATION, et al.,

Petitioners,

v.

TOWN BOARD OF THE TOWN OF BROOKHAVEN, THE TOWN OF BROOKHAVEN, and CAITHNESS LONG ISLAND, LLC, et al.,

Respondents.

SUPPLEMENTAL BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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INTRODUCTION[1]

On July 8, 2009, petitioners submitted a reply brief in support of their petition for a writ of certiorari. Respondent Caithness Long Island LLC ("Caithness") respectfully submits that most of that reply brief is unauthorized under Court Rule 15 because, rather than addressing "new matters" raised in the opposition briefs, petitioners simply rehashed issues that were already extensively discussed in the initial petition for certiorari. However, in their reply brief, petitioners also contend that the judgments below should be reversed or remitted for consideration in light of this Court's recent decision in *Caperton v. A.T. Massey Coal Co., Inc.*, 556 U.S. ____, 129 S. Ct. 2252 (2009). To the extent Rule 15(8) allows parties to submit supplemental briefs to address cases decided while a petition is pending, Caithness submits this supplemental brief for the limited purpose of addressing that case.

A. Petitioners Never Made Any Motion Or Request That Any Town Board Member Recuse Him Or Herself From Hearing Caithness's Application

Petitioners contend that they suffered a due process violation analogous to the facts in *Caperton*. Pet. Reply Br. at 5. They did not. In *Caperton*, this Court held that it was a due process violation for a

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[1] Terms of reference and abbreviation used herein have the same meaning as in Caithness' main brief in opposition to the petition.

judge who received millions of dollars in campaign contributions from one of the parties to a case before him *to deny a motion to recuse himself* from the panel of judges hearing that party's case on appeal. *Caperton*, 129 S. Ct. at 2257 (holding that "in all the circumstances of this case, due process *requires recusal*") (emphasis added). Unlike the plaintiff in *Caperton*, petitioners here never made any motion or application for recusal, nor any request of any kind that any of the Town Board members recuse themselves from consideration of Caithness's application for a special use permit. Moreover, petitioners have never argued at any level (and indeed have not even argued in their submissions to this Court) that any Town Board member had any obligation to recuse him or herself at any point. For that reason alone, *Caperton* is clearly inapplicable to this case.

B. Even If Petitioners Had Made A Motion For Recusal, There Was No Due Process Violation Under *Caperton*

Even if this Court overlooks the fact that petitioners never made any motion for recusal, there was still no due process violation. Indeed, this Court recognized in *Caperton* that "'most matters relating to judicial disqualification *[do] not rise to a constitutional level.*'" *Caperton*, 129 S. Ct. at 2259 (quoting *FTC v. Cement Institute*, 333 U.S. 683, 702 (1948)) (emphasis added) (modification in original). *See also State v. Quezada-Meza*, No. 1 CA-CR 07-1065, 2009 WL 1900441, at *3 (Ariz.App. Div. 1 July 2, 2009) ("It is a rare case, however, in which

matters relating to judicial bias rise to a constitutional level.") (citing *Caperton*). Rather, the Constitution is only implicated where the judge's continued participation in the case "'poses such a risk of actual bias or prejudgment that the practice must be forbidden if the guarantee of due process is to be adequately implemented.'" *Caperton*, 129 S.Ct. at 2263.

Petitioners cannot meet that high standard. They appear to argue (though it is far from clear) that the Community Benefits Package (none of which, of course, was paid to the Town Board members or anybody affiliated with them) "biased" certain members of the Town Board when it voted to approve the SEQRA resolution and the special use permit. Pet. Reply Br. at 6. Even if this were true (which, as set forth exhaustively in Caithness's opposition brief, it is not), that does not amount to a due process violation.

This Court was careful to point out in *Caperton* that "[n]ot every campaign contribution by a litigant or attorney creates a probability of bias that requires a judge's recusal." *Id.* at 2263. Rather, this only occurs in an "exceptional case," such as the facts presented in *Caperton*. *Id.* In *Caperton*, there was "a serious risk of actual bias-based on objective and reasonable perceptions-*when a person with a personal stake in a particular case had a significant and disproportionate influence in placing the judge on the case by raising funds or directing the judge's election campaign when the case was pending or imminent.*" *Id.* (emphasis added). *See also Marek v. State*, No. SC09-1080, 2009 WL 2045416, at *14 (Fla. July 16, 2009) (explaining that *Caperton* was

"determined on the basis of *extraordinary facts* regarding a litigant's campaign contributions to a state supreme court justice," and did not mandate recusal) (emphasis added).

Caithness had no such "significant" or "disproportionate" influence in placing any individuals on the Town Board or directing any Town Board member's election campaign while its application was pending. On the contrary, all Caithness did was provide for a lawful Community Benefits Package, which consisted primarily of lawful PILOTs (*i.e.* tax payments). *See* Caithness Opp. Br. at 11-12. Petitioners take issue with an increase of $1 million in a $151 million package that went, not to any Town Board members, but to the Town and to local school districts. *Id.* at 11 n.5. This is not at all comparable to the facts in *Caperton*, which, as the Court explained, were "extreme by any measure." *Caperton*, 129 S. Ct. at 2265.

On the contrary, this Court has recognized that "[s]erving constituents and supporting legislation that will benefit the district and individuals and groups therein is the everyday business of a legislator," including the Town Board members. *McCormick v. U.S.*, 500 U.S. 257, 272 (1991).

Indeed, the Court in *Caperton* reiterated that the conduct of municipalities only violates due process when it "'shocks the conscience.'" *Id.* (quoting *County of Sacramento v. Lewis*, 523 U.S. 833, 846-47 (1998)). As set forth in Caithness's opposition brief, that standard was clearly not met here. *See* Caithness Opp. Br. at 36-38.

C. Petitioners Waived Any Argument That The Failure Of Any Town Board Member To Recuse Him Or Herself Violated Due Process By Failing To Assert Any Such Argument Below Or In Their Petition For Certiorari

In any event, petitioners clearly waived any claim that their due process rights were violated by the purported refusal of any allegedly biased Town Board members to recuse themselves. Such a claim was never raised below, nor was it raised in the petition for a writ of certiorari.

Indeed, as set forth in Caithness's opposition brief, petitioners never properly raised *any* federal or constitutional claims in the state court proceedings, which precludes them from raising *any* constitutional claims before this court. *See* Cathness Opp. Br. at 26-31. Nor did petitioners properly specify *any* federal or constitutional claims in their petition for a writ of certiorari. *Id.* at 32-33.

Moreover, the petition for a writ of certiorari *does not even mention* any purported bias on the part of any Town Board members, much less argue that such alleged bias amounted to a due process violation. Nor did the petition argue at any point that any of the Town Board members had a constitutional duty to recuse themselves from the proceedings. It is well-settled that an issue which is not included in the petition for certiorari cannot be considered by the Court. *See* Sup. Ct. R. 14.1(a); *Day v. McDonough*, 547 U.S. 198, 203 n.2 (2006).

Finally, any contention that *Caperton* imposed a "new" constitutional standard for recusal that

could not have been asserted by petitioners before that case was decided is without merit. Indeed, the second paragraph of the *Caperton* decision quoted prior precedent from this Court for the proposition that recusal is required where "'the probability of actual bias on the part of the judge or decisionmaker is too high to be constitutionally tolerable.'" *Caperton*, 129 S.Ct. at 2257 (quoting *Withrow v. Larkin*, 421 U.S. 35, 47 (1975)). So any contention that *Caperton* announced a "new" constitutional rule or standard is entirely without merit. As one judge recently explained, the only thing "new in Caperton was not the objective standard [for recusal under the Constitution], but the *application* of that standard to the area of judicial elections--something utterly irrelevant" to this case. *U.S. v. Basciano*, 7/6/2009 NYLJ 26, (col. 3) (E.D.N.Y.) (Garaufis, J.) (emphasis added).

CONCLUSION

Rule 10 of this Court states that a "petition for a writ of certiorari will be granted only for compelling reasons". No such reason has been shown here. It is therefore respectfully requested that this Court deny the petition for certiorari.

Dated: July 23, 2009

Respectfully submitted,

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